IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 75

FORD MOTOR COMPANY,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

MERLE H. MILLER,
Counsel for Petitioner,
951 Consolidated Bldg.,
Indianapolis, Ind.

JAMES A. ROSS,
Of Counsel.

C. E. Pauli & Co., Inc., Indianapolis

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CITATION OF STATUTES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Ford Motor Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit

entered in the above entitled cause on March 4, 1944, affirming a decision of the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in *Ford Motor Company v. Department of Treasury of the State of Indiana*, — Fed. (2nd) —, also in the record here at page 98.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 4, 1944. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. Sec. 347.

QUESTIONS INVOLVED

1. Whether the "source" of petitioner's gross income for the years 1935, 1936 and 1937 from "Class A" sales was "within the State of Indiana" so as to be taxable under the Indiana Gross Income Tax Act of 1933 and under the Act as amended in 1937, as construed by the Supreme Court of the State of Indiana in the case of *Department of Treasury v. International Harvester Company* (1943), — Ind. —, 47 N. E. (2nd) 150, the District Court having found that the orders for the goods involved were received and accepted by petitioner outside the State of Indiana, the goods manufactured outside the State of Indiana, deliveries made to the purchaser or purchaser's agent outside the state and the purchase price paid, either to the seller outside the State of Indiana or to an independent

carrier within the state for transmittal to the seller outside the state.

2. Whether an account stated arose between the respondent and petitioner where the respondent upon a hearing duly held before a hearing judge, authorized to bind the Department of Treasury, determined that petitioner was entitled to a refund of the tax assessed and paid on the transaction outlined (Class A sales), and where respondent, by its answer to petitioner's complaint for such refund, admitted authenticity of the determination so made, and where, although the amount of the award for the refund was not stated in dollars and cents, but was not in dispute, and subsequent to award was stipulated by the parties to be the amount assessed and paid by petitioner, *i. e.*, Seventy-eight Thousand Five Hundred Fourteen Dollars and Ten Cents ($78,514.10).

STATEMENT

This was an action commenced in the United States District Court for the Southern District of Indiana, Indianapolis Division, by the petitioner against the respondent, to recover taxes assessed against and paid by the petitioner for the years 1935, 1936 and 1937, under the Indiana Gross Income Tax Act of 1933 and under the same act as amended in 1937. The tax assessed, and for which recovery was sought, related to two classes of sales, referred to in the findings and in the proceedings as Class A sales and Class B sales. Class B sales related to transactions which involved petitioner's branch in the State of Indiana. A refund on this class of sales is not claimed in this petition. The "Class A sales" involve transactions considered by the petitioner to be wholly outside the State of Indiana,

and are transactions made and concluded by petitioner's branches at a situs outside the State of Indiana, and on this phase of the controversy petitioner clings to its claim for a refund of the amount, including interest, actually assessed and paid on this particular class of sales, to-wit, the sum of $78,514.10 (R. 77). The District Court denied petitioner relief, and on appeal to the Circuit Court of Appeals the judgment of the District Court was affirmed (*Ford Motor Co. v. Dept. of Treasury of the State of Indiana*, — Fed. (2d) —), also see record here page 98.

The facts as found by the District Court, relating to the class of transactions here involved, may be summarized as follows:

Source of Income

Plaintiff was a corporation foreign to the State of Indiana (R. 41). All of its products were manufactured outside the State of Indiana (R. 42) and sold by its branches located outside the State of Indiana to independent dealers located within the State of Indiana. These independent dealers sold to the ultimate consumer (R. 43). All of petitioner's dealers in Indiana involved in "Class A sales" were assigned to and allocated to various branches located in Louisville, Kentucky, Chicago, Illinois and Cincinnati, Ohio (R. 42).

Orders for petitioner's products were forwarded by the dealers to and received by petitioner's branches outside the State of Indiana (R. 49, 50). The products were manufactured to the specification of the dealer's order (R. 52) by petitioner's assembly plants whose situs were likewise outside the State of Indiana (R. 78). Due to the importance of the finding with regard to the actual de-

livery of the products to the dealer, we quote the finding which specifically relates to that subject. After finding the facts relating to the manufacture of the products ordered by the dealer, the District Court specifically found:

> "(f) The car then rolls off of the end of the line to the door of the assembly building where it is filled with gas and oil, and then is driven out of the plant by an employee of the plaintiff, and on the grounds of the plaintiff receives a short road test and a final check. It is then brought to the gate of the assembly branch and at that gate a representative of the independent truck-away company, or the dealer himself who is to receive the car checks the car with the car checker of the plaintiff. If the car is found to match the invoice, the checker of the plaintiff at gate signs the invoice on the line marked 'Initials of Car Checker.' The dealer or the independent truck-away company as agent of the dealer signs the invoice on the line marked 'Signature of Dealer (indicating receipt),' and dates his signature with the date that the car leaves the gate. The dealer, or the dealer's representative of the truck-away company, then gets into the car and drives it off of the plaintiff's property.
>
> ". . . .
>
> "(h) It has been a custom of long standing for the employees of the truck-away company to sign for the dealers as their agent. All dealers know of the practice, and have acquiesced fully in it." (R. 52.)

The truck-away or convoy company referred to was not owned by the petitioner but was an independent carrier (R. 56), and the risk of loss after the products left the gate of petitioner's assembly plant was on the carrier (R. 56).

The price for the products involved was either (1) paid in full before they left the gate of the assembly plant; (2) paid in whole or in part by finance papers executed before the products left the gate, by the dealer or a representative of the truck-away company who was authorized by written power of attorney to execute such papers by the dealer; or (3) by payment in cash to the truck-away company at dealer's place of business or by finance papers executed by the truck-away company as agent for the dealer after the products left the branch. No products except parts were sold on open account (R. 53). Although the price was not always paid in full before the car or truck, or other products, left the gate of the assembly plant—

> "plaintiff looks to the truck-away company for payment in full." (R. 56.)

Under the contract between the petitioner and its said dealers, title to its products was reserved until the price was paid

> "but regardless of title remaining in the Company or having passed to Dealer, all shipments shall be at Dealer's risk from the time of delivery to carrier at place of shipment." (R. 45.)

> "The collections so received by the truck-away or convoy companies were by them taken and delivered in due course to the respective branches of the plaintiff aforesaid entitled to receive the same, were deposited by such branches in their regular depository as hereinbefore found, and were thereupon subject to the further order and disposition by the plaintiff as its property." (R. 64.)

Petitioner, in the first instance, paid the truck-away company's transportation charges, but under its contract

with the dealers was reimbursed for freight charge from Dearborn on separate items set up on the invoice to cover the charge (R. 56).

In a few instances after invoices were made out to the dealer, and either before or after the car left the assembly plant gate, the car was re-allocated to another dealer on advice of a branch (R. 57-59).

Intermingled with the District Court's findings of fact are certain conclusions which are wholly repugnant to the specific facts otherwise found and heretofore recited, namely:

> "All of the gross receipts . . . upon which the taxes and interest were assessed and collected . . . were received by plaintiff while it was engaged in business in Indiana, and derived from sources within Indiana. . . ." (R. 79-80.)

And, further that in making collections the truck-away or convoy company was acting as the agent for the petitioner. (R. 80.)

The United States Circuit Court of Appeals, by its opinion and judgment held:

> "From these findings, it is clear that Class A sales were sales of merchandise manufactured and assembled outside of Indiana but that every transaction in the sale, with the exception of the shipment of the goods and the receipt of some orders, took place in Indiana."

The Account Stated

During the pendency of this action petitioner, at the invitation of respondent, requested a rehearing on its claim for refund (R. 68-69). The claim was reviewed by the re-

spondent on its merits, and on March 1, 1941, the hearing judge of the Department, who had authority and power to bind the Department (R. 39-40), by written opinion determined that:

> "The Department will accordingly take the necessary steps to make refund of the gross income tax paid on the transaction outlined above." (R. 75.)

The transactions outlined in the opinion are described by the "hearing judge" in these words:

> "These Indiana customers are for the most part retail automobile dealers. The Ford Motor Car Company will make delivery of such automobiles to the Indiana customers or to their authorized agents at the delivery gate of its out-of-State manufacturing plant or assembly plant. Deliveries of the products desired by Indiana customers are made under conditions whereby the Ford Motor Car Company, at the time of the delivery to the customers or the customers' authorized representatives, will be paid for the products, or appropriate financing will be arranged for by the customers or by their authorized agents.
>
> "It is further disclosed that the Ford Motor Car Company in regard to sales made to Indiana customers resident within the territorial jurisdiction of the outside manufacturing and assembling plants does not have the obligation or the responsibility, under the terms of the sale, to make delivery of the products desired by Indiana customers to those customers across State lines, nor does any obligation or responsibility to initiate such transportation across State lines exist. It is indicated that the entire responsibility of the Ford Motor Car Company to the customer ceases at the time of delivery of the products to the Indiana customers or to their

> authorized representatives at the delivery gate of the manufacturing or assembling plants outside of the State of Indiana.
>
> "It is, therefore, indicated that such a transaction is completed at a business situs entirely outside of the State of Indiana, and that such a transaction is not a transaction made in interstate commerce, and that the question of facilities is not existent in this transaction." (R. 74-75.)

The amount of the award was not stated in the opinion, but the District Court found, as to "Class A" transactions, that, before the determination of the hearing judge aforesaid, counsel for both the petitioner and respondent, as well as the hearing judge, agreed:

> "that the $78,000 part of the claim had been audited and those figures agreed upon at the time it was paid." (R. 71.)

Respondent, by answer filed in this cause before the determination of the hearing judge aforesaid, admitted that the amount assessed and paid (including interest) on account of

> "gross receipts from the sale of cars, trucks, and parts to dealers located within the State of Indiana where such payments or gross receipts and business was allocated by the plaintiff to its Chicago, Illinois, or Cincinnati, Ohio, or Louisville, Kentucky, branches"

(Class A sales), was the sum of $78,514.10. (R. 21.) Later, on December 1, 1941, for the purposes of the trial, the parties stipulated that the amount paid on account of those sales was $78,514.10. The Court further found:

> "This item of $78,514.10 was known and referred to by the parties in some of their discussions as the

> $78,000.00 claim, and was thus distinguished from the claim of $37,259.24, which was known and sometimes referred to by them as the $37,000 claim." (R. 66.)

The amount of the claim was not at any time in dispute, and could not be more or less than the amount actually assessed and paid. The determination was never rescinded or withdrawn by respondents (R. 76).

Petitioner later, and during the course of the proceedings in the District Court, filed a supplemental complaint seeking recovery on the theory of an account stated.

Opposed to the foregoing specific facts found or admitted are other statements which are included in the findings of fact as follows:

> "Defendant did not know what plaintiff's gross income from such transactions was when said order was issued. . . ." (R. 77.)

> "At no time did defendant or any of its attorneys, agents or employees promise plaintiff that the sum of $78,514.10, or any other specifically stated amount would be refunded to plaintiff. No certificate of over-assessment was issued to plaintiff by defendant at any time." (R. 77.)

The United States Court of Appeals in this cause further held:

> ". . . the alleged account stated was not found to be for any specific amount."

The determination made by the hearing judge was binding on the Department. In this respect the District Court found:

> "Elmer F. Marchino is the Hearing Judge of the Gross Income Tax Division of the Department of Treasury, and has been such continuously since May, 1933. As such, he hears and determines objections to proposed additional assessments of Gross Income Tax and petitions for the refund of Gross Income Tax. He has the power and authority to determine the facts involved on any notice of proposed assessment of additional tax or petition for refund of tax, and the right to determine, from a legal status, the policy of the Department." (R. 41-42.)

The respondent's answer admitted:

> "The defendants admit that thereafter, and on March 1, 1941, the defendant Department of Treasury acquiesced in the plaintiff's petition for reconsideration of its ruling, and issued a second letter of finding, dated March 1, 1941, which read as follows: . . ." (R. 36.)

(Then follows a copy of the letter relied upon in petitioner's supplemental complaint and referred to in the findings. (R. 36.))

Respondent further admitted by its answer:

> "The defendants further answering paragraph '4' admit that on or about March 1, 1941, the defendants mailed the letter of findings reproduced above to the plaintiff." (R. 38.)

Notwithstanding the foregoing specific findings of the trial court and the admissions of Respondent's answer, the Court of Appeals held:

> ". . . the hearing judge's later ruling was not approved by the department. . . . No one, who was authorized to do so stated an account. . . ."

REASONS FOR GRANTING WRIT

1. In ruling that, under the facts found by the District Court, the source of income involved under Class A sales was in Indiana, the Circuit Court of Appeals decided an important question of local law probably in conflict with an applicable decision of the Supreme Court of Indiana, namely, *Department of Treasury v. International Harvester Company* (1943), 47 N. E. (2nd) 150.

2. In ruling that, under the facts found by the District Court no account stated arose between the parties, the Circuit Court of Appeals decided an important question of local law probably in conflict with applicable local decisions.

3. The decision of the Circuit Court of Appeals as to the account stated sued on, by holding that no account stated arose between the parties, is an erroneous decision of an important question of general law, is probably untenable and is in conflict with the weight of authority and the decisions of this Court.

4. In disregarding the specific facts found by the District Court and basing its opinion upon erroneous conclusions of law intermingled with the facts, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the "source" of petitioner's gross income from "Class A sales" was within the State of Indiana.

2. In holding that petitioner's gross income from sales made by it on orders received and accepted, goods manufactured and deliveries made to its dealers and their carrier agents, all done at a situs outside the State of Indiana, was subject to the imposition of the tax laid by Section 2 of the Gross Income Tax Law of the State of Indiana enacted in 1933, Burns' Indiana Revised Statutes (1933), Sec. 64-2602, and amendment thereto of 1937, Burns' Indiana Revised Statutes (1943), Sec. 64-2602, contrary to the local applicable decision of *Department of Treasury v. International Harvester Co.* (1943), 47 N. E. (2d) 150.

3. In holding that no account stated arose between petitioner and respondent as to "Class A sales," where the amount was not in dispute and respondent, upon a hearing upon the merits of the claim, made and issued to petitioner an order for the refund of the taxes involved.

4. In disregarding the specific facts found by the District Court and basing its decision solely upon conclusions of law of the District Court intermingled with findings of fact, which are inconsistent with and repugnant to the specific facts found.

CONCLUSION

WHEREFORE your petitioner respectfully prays that this petition be granted and that a writ of certiorari be issued directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to

certify and send to this Court for its review and determination a full and complete transcript of the record and proceedings in the cause numbered and entitled "No. 8417, Ford Motor Company, Plaintiff-Appellant v. Department of Treasury of the State of Indiana, et al., Defendants-Appellees."

MERLE H. MILLER,
Counsel for Petitioner.

JAMES A. ROSS,
Of Counsel.

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DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals below was rendered on March 4, 1944, and is reported at — Fed. (2d) —; it is also reproduced in the Record at pages 98 to 103.

JURISDICTION

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by Act of February 13, 1925, 43 Stats. 928, 28 U. S. C. A. Sec. 347.

STATEMENT OF THE CASE

The Court is respectfully referred to the Statement of the Case under the heading "Statement" in the foregoing petition for writ of certiorari (*supra* pages 3 to 11).

SPECIFICATION OF ERRORS

Reference is here made to the specification of errors contained in the petition for certiorari, page 13 *supra*, for the specifications of error to be urged, and request is made that the same be treated as here written without repetition.

SUMMARY OF ARGUMENT

Source of Income

The decision and opinion below is in conflict with the decision of the Indiana Supreme Court in the case of *Department of Treasury v. International Harvester Co.* (1943), 47 N. E. (2nd) 150.[1] This is true in spite of the attempt in the majority opinion to distinguish the present case from the facts exhibited in the International Harvester case.

The dissenting judge below found "it impossible to distinguish the facts here from those in the case of *Depart-*

[1] *Department of Treasury v. International Harvester Co.*, is before this Court on appeal, No. 355, on questions other than sales of the character of "Class A Sales", there and here involved.

ment of Treasury v. International Harvester Co. . . ." and petitioner submits that a candid comparison of the two decisions will serve better than anything else to demonstrate the correctness of the quoted statement of the dissenting judge.

The act in question provides for a tax "upon the gross income *derived from sources within the State of Indiana* . . ."[2] of persons or companies not residents of the State of Indiana. The Supreme Court of the State of Indiana, in the case of *Department of Treasury v. International Harvester Co., supra*, construing this statute, held that it must be construed more strongly against the state and can not be extended by implication beyond the clear import of the language used so as to embrace transactions not specifically pointed out, and therefore transactions occurring outside the state, which constitute "the source" of the income, are not taxable, even though some activity relating to such transaction occurs within the State of Indiana, because "we can not say that the income so received was 'derived from sources within the State of Indiana.' "

In the case at bar the majority opinion relies upon a specific finding of fact set forth on the face of the opinion. (Finding No. 10.) An examination of that finding discloses that the only activity which took place in the State of Indiana was the activity of an independent carrier in transporting the goods from without the state to the dealer within the state and carrying the price back to the petitioner at a point outside the state. These are the facts upon which the court below held the tax valid, yet peti-

[2] Pertinent statutes and Regulations are set forth in Appendix, infra, p. 28.

tioner's activities in delivering the goods to the carrier and in receiving the price was entirely outside the state. Under the decision of the state court referred to, this is not a taxable transaction under the Indiana Gross Income Tax law, yet on these facts the court below affirmed the validity of the tax and denied recovery. This situation is "inadmissible" under the decision of this Court in *Erie Railroad v. Tompkins* (1938), 304 U. S. 64, and subsequent decisions.

Petitioner challenges the decision below as a departure from the accepted and usual course of judicial procedure in this—it is believed that the findings of fact of the District Court were binding upon the Circuit Court of Appeals as well as upon the parties, and that the Court was not at liberty to disregard the facts found by the District Court that the goods here involved were delivered to "the dealer or dealer's representative . . ." outside the state (R. 52), and that the orders for the goods were "forwarded by the dealer to the branch of the company to which the dealer is assigned" (R. 50). These facts were clearly and unequivocally found, and emphasize the transactions as clearly not taxable under the applicable decision of the Supreme Court of Indiana.

Account Stated

The decision of the court below on this phase of the case turned, first, on the authority of the "hearing judge" to make a binding order, and, second, on whether the amount of the award must of necessity be stated in the award as some definite and certain amount. On the first point, the court below is believed by petitioner to have gone outside the record to make a determination to the effect that the

"hearing judge" had no authority to make the order. The findings of fact by the District Court (R. 41) clearly state "He has the power and authority to determine the facts involved on any . . . petition for refund of taxes and the right to determine, from the legal status, the policy of the Department." Furthermore, respondent's answer admits that the order made by this "hearing judge" was issued and delivered to the defendant by the Department of Treasury (R. 36). Thus, when the court below determined that "the hearing judge's later ruling was not approved by the Department," it went beyond the issues and clearly outside the record before it. Here again it is believed by respondent that a departure from the accepted and usual course of judicial procedure is demonstrated.

As to the second point, the court below determined that "the alleged account stated was not found to be for a specific amount." Therefore it was determined that there was no liability on the theory of an account stated. To make this determination the court below must have been obliged to disregard the District Court's finding of fact, namely, "that the Seventy-eight Thousand Dollar part of the claim had been audited and those figures agreed on at the time it was paid." (R. 71.) Since the amount was not in dispute, and since it could neither be more nor less than the amount assessed and actually paid on this class of sales, the designation in the award of the specific amount was not necessary to constitute an account stated, under the weight of authority and the decisions of this Court as hereinafter cited and set forth. The decision of the court below, therefore, is untenable and in conflict with the weight of authority and the decisions of this Court.

ARGUMENT

Source of Income

It is to be regretted that the majority opinion below did not disclose the clear fact found by the District Court to the effect that the orders for the goods were transmitted by the dealer to the petitioner and were received by the petitioner outside the State of Indiana (R. 49, 50), nor the further fact that the goods were delivered to the dealer or the dealer's agent outside the state (R. 52). Had these facts been disclosed on the face of the opinion, the Court would have been obliged to write that every transaction involving the sale and delivery of the products here involved occurred outside the State of Indiana. Instead of doing this, the Court wrote "From these findings it is clear that Class A sales were sales of merchandise manufactured and assembled outside of Indiana but every transaction in the sales, with the exception of the shipment of the goods and the receipt of some orders, took place in Indiana."[3] Also, if it had appeared on the face of the opinion, as actually found by the District Court, that petitioner "looked to the truck-away company for payment in full" (R. 56) it would have been impossible to assert any activity whatever on the part of petitioner in the State of Indiana. But, in spite of the absence of these very material facts from the opinion, sufficient facts do appear to illustrate its conflict with the International Harvester case.

The following are the only facts which are given by the Court to support its opinion and are to be found in Finding No. 10 of the District Court, quoted in the opinion,

[3] All orders, not "some", were forwarded to outside branches. (R. 50.)

viz., the goods were manufactured outside the state; shipped from outside the state by means of a carrier to dealers within the state; the price was paid to the carriers and "by them taken and delivered in due course to the respective branches of plaintiff aforesaid entitled to receive the same . . . and were thereupon subject to the further order and disposition by plaintiff as its property." Thus, the only activity which is shown on the face of the opinion to have occurred in Indiana *was the activity of the carrier* in carrying the goods to the dealer and in receiving the price from the dealer and carrying it back to the petitioner outside the state. Under the decision in the International Harvester case such an activity does not constitute *the source* of the income and such an activity is not pointed out or embraced by the tax statutes here involved. Yet, under the decision of the Court of Appeals in this case, the transaction of the carrier, in collecting the price and transmitting it to the petitioner, is made "the source" of petitioner's income and therefore taxable under the statute. Under this construction of the statute, anyone who ships goods C. O. D. into Indiana by carrier is liable for the gross income tax under the statute in question, on the ground that the receipt of the price by the carrier is the source of the shipper's income. Nothing could be more untenable than such a construction. Such a construction would make the act vulnerable to attack on the ground that it violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. In the International Harvester case it does not appear, at least on the face of the opinion, how the purchase money was paid to the manufacturer—whether it was collected by a carrier or transmitted by mail. However, it could make no difference which method was employed. The price was received

by the manufacturer outside the state in either case. It should be further noted that in the Harvester case orders were solicited in Indiana by representatives of the out-of-state branches; still this did not have the effect of fixing the source of the income as being in the State of Indiana, for, said the court:

> "The appellants would have us construe the statute as exempting only income derived entirely from activities outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was 'derived from sources within the state of Indiana.'"

To demonstrate that the case at bar is actually a stronger case for the taxpayer than was the International Harvester case, we set forth the description of the transaction held exempt by the Indiana Supreme Court as set forth in its opinion:

> "Class A: Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses, or factories located outside Indiana."

Again, referring solely to the facts set forth on the face of the opinion and disregarding the actual facts found by

the District Court and omitted from the opinion, it is clear as a legal proposition that when the goods were delivered to the carrier outside the State, as recited in Finding No. 10, title to the goods passed to the dealer, notwithstanding that they were shipped C. O. D., or notwithstanding that the carrier was to collect the price. Petitioner's interest was merely a security interest.

United States v. Andrews (1907), 207 U. S. 229;

46 Am. Jur. page 611, and authorities collected;

Sec. 19, Uniform Sales Act;

Sec. 22, Par. (a), Uniform Sales Act;

Sec. 20, Par. (2), Uniform Sales Act;

Jones v. United States (1909), (C. C. 4), 170 Fed 1;

Savannah Chemical Co. v. Grace & Co. (1923), 293 Fed. 145;

Maffei v. Ginocchio (1921), 299 Ill. 254, 132 N. E. 518;

The Pennsylvania Co. v. Poor (1885), 103 Ind. 553.

In view, therefore, of the passing of title at a situs outside the State of Indiana, under the facts set forth in the opinion, there is nothing left upon which to base the determination that the "source" of petitioner's income was within the State of Indiana.

Compania General De Tobacos De Filipinas v. Collector of Internal Revenue (1929), 279 U. S. 366;

Comr. v. East Coast Oil Co., S. A., 85 Fed. (2nd) 322, (C. C. A. 5th 1936), Cert. Den. 299 U. S. 608.

Petitioner is not unmindful of the further finding by the District Court set forth on the face of the opinion below to the effect that the gross receipts "were received by plaintiff while it was engaged in business in Indiana and derived from sources within Indiana" but confidently asserts that this finding is an erroneous conclusion of law and does not overcome specific facts which, as a matter of law, impel a contrary conclusion.

United States v. Jefferson Electric Manufacturing Company (1933), 291 U. S. 386, 407;

Pike Rapids Power Company v. Minneapolis, etc. Company, 99 Fed. (2d) 902, Cert. Den. 305 U. S. 660;

Utter v. Eckerson (C. C. A. 9th 1935), 78 Fed. (2d) 307, 308.

There is also another finding relied upon by the Court of Appeals to the effect that the carrier, in making the collection of the price, did so as the agent of the petitioner. In view of the specific findings by the District Court that petitioner "looked to the truck-away company for payment in full" (R. 56) and "risk of loss was on the truck-away company" (R. 56) this statement in the finding would also appear to be an erroneous conclusion, contrary to the specific facts found, but, regardless of the character of the statement, whether a conclusion of law or an ultimate fact, the collection of the price by a carrier, as hereinbefore pointed out, can not correctly be said to be the "source" of petitioner's income under the statute as construed by the Indiana Supreme Court.

Therefore, petitioner insists that these conclusions, intermingled with the findings of fact, do not serve to dis-

tinguish the present case from the International Harvester case.

Petitioner respectfully submits that it has presented to this Court an instance of a judicial determination of public importance where the Federal Court has in fact not seen its way clear to follow the decision of the Supreme Court of Indiana in the construction of a local statute. Wholly aside from the fact that petitioner has not been accorded the same construction of its activities as was accorded the International Harvester Company in the State Court, where the activities of both were virtually identical, it is urged that confusion will of necessity arise in the future administration of the statute. Therefore, the petition for certiorari should be sustained, so that there may be uniformity in both State and Federal Courts.

Account Stated

The decision of the Court of Appeals below to the effect that no account stated arose between the parties because no definite amount was stated or specifically mentioned is clearly untenable and against the weight of authority because there was no occasion to state the amount as it was not in dispute. The only dispute between the parties was one of law. When the Department of Treasury of the State of Indiana, by and through the "hearing judge", resolved the question of the "source of income" in favor of the petitioner and the respondent "issued" such determination to the petitioner (R. 36), there was nothing left to be put in issue and the minds of the parties therefore met. The amount assessed and paid was a specific amount and with the liability for refund resolved,

the amount to be refunded must, of course, be the amount paid.

Goodrich v. Coffin (1891), 83 Me. 324, 22 Atl. 217;

Cited with approval in United States v. Bertelsen, & Petersen's Engineering Co. (1939), 306 U. S. 276, 280;

Bonwit Teller & Co. v. United States (1931), 253 U. S. 258;

Woodsworth v. Kales (6 C. C. A. 1928), 26 Fed. (2d) 178.

Departure From Accepted and Usual Course of Judicial Proceedings.

The petitioner has heretofore, both in the petition and in this brief, directed attention to a situation where, it is believed, the Circuit Court of Appeals below did not consider itself bound by certain material facts found by the District Court, and therefore reached a conclusion in spite of them. The truth of this statement can only be determined by a consideration of the findings which have been pointed out. We assert that since the evidence was not before the Court of Appeals, that Court was bound by the facts found and was not at liberty to reach a conclusion in disregard of the facts found (*Re 620 Church Street Bldg. Corporation* (1936), 299 U. S. 24, 27). Petitioner does not wish to further elaborate on this phase of the matter, except to say that judicial matters of this kind should certainly come under the supervision of this Court. Otherwise judicial proceedings lose efficacy in the administration of justice.

It is respectfully submitted that the petition herein for writ of certiorari should be granted.

MERLE H. MILLER,
Counsel for Petitioner.

JAS. A. ROSS,
of Counsel.

APPENDIX A

The Statute

Chapter 50, Acts of Indiana 1933

"AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this Act, and declaring an emergency."

"Section 1. Be it enacted by the general assembly of the State of Indiana, That this Act may be cited as the 'Gross Income Tax Act of 1933.'"

. . . . . .

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income; and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income *derived from sources within the State of Indiana*, of all persons and or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Chapter 117, Acts of Indiana 1937

"AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment, and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency.

Be it enacted by the General Assembly of the State of Indiana:

Section 1. That this act may be cited as the 'Gross Income Tax Act of 1933.'

. . . . . .

(m) The term 'gross income,' except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer . . . received from trades, businesses, or commerce, . . . Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto . . ."

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and or domiciled in the State of Indiana, except as herein otherwise

provided; and upon the receipt of gross income *derived from activities or businesses or any other source within the State of Indiana*, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Regulations

Regulation 191. (*In force from May 1, 1933, to December 31, 1935.*)

"Any taxpayer having gross receipts derived from earnings or activities carried on entirely without the State of Indiana will not be required to include such receipts in any return already filed or to be filed prior to the time that the supreme court of the State of Indiana shall render a decision affecting the right of the State of Indiana to impose a tax thereon."

Regulation 193. (*In force from January 1, 1936, to June 30, 1937.*)

"Regulation 191 issued by the Department of Treasury respecting income derived by residents of Indiana from earnings, or from activities, carried on entirely outside the State of Indiana, is hereby revoked and the deferment privilege granted thereunder is hereby cancelled. Hereafter all income from activities from sources entirely outside the State of Indiana will be designated as 'taxable' or 'non-taxable'—the words 'deferrable' and 'non-deferrable' being no longer applicable to such income.

All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to report for taxation their gross income received on and after May 1, 1933, from all sources, including that derived from out of state sources and activities except where such gross income is derived from a business regularly carried on, the situs of which is outside the state; from real property situated outside the state; or from intangibles having a business situs outside of Indiana and such intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

For the purpose of fixing the taxable status of specific kinds of income, the following rulings are made as a part of this regulation with respect to the classifications set out.

. . . . . .

4—RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.' "

Regulation 3500. (*In force from July 1, 1937, to end of period covered by this case.*)

"*Taxable and Non-Taxable Income Received from Sources in Other States.* All persons as defined in the Gross Income Tax Act who are resident and/or domiciled in Indiana will be required to

report for taxation their gross income received from all sources, including that derived from out of state sources and activities except, (1) where such gross income is derived from a business regularly carried on, the situs of which is outside the state; (2) income from real property situated outside the state; (3) or income from intangibles having a business situs outside of Indiana and which intangibles are not held within the State of Indiana. The mere fact that income is received from a point located out of the State will not of itself affect the taxability of such income.

Note: Indiana has no reciprocal agreement with any other state whereby deductions or credits may be taken by either resident or non-resident taxpayers on account of income earned in other states or on account of taxes paid thereon to such other states.

For the purpose of fixing the taxable status of specific kinds of income, the following rules are made as a part of this regulation with respect to the classifications set out:

. . . . . .

RULE 4—RECEIPTS FROM BUSINESSES MAINTAINED AND OPERATED WHOLLY OUTSIDE THE STATE. Persons resident and or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.' "

Regulation 3600. (*In force from July 1, 1937, to end of period covered by this case.*)

"*Extent of Tax Liability of Non-Residents.* Section 2 of the gross income tax Act provides that the tax shall be imposed upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana. Since non-residents are entitled to the same annual exemption as residents, therefore they will be liable for making return of and payment of tax upon all gross receipts derived from Indiana sources in excess of $1,000 in any calendar year."